NO. 80251-3

SUPREME COURT OF THE STATE OF WASHINGTON

VERNON BRAATEN,

Plaintiff/Appellant/Respondent on Review,

v.

BUFFALO PUMPS, INC., INC. (sued individually and as successor-in-interest to BUFFALO FORGE COMPANY); CRANE CO.; IMO INDUSTRIES, INC. (sued individually and as successor-in-interest to DE LAVAL TURBINE, INC. and WARREN PUMPS); and YARWAY CORPORATION,

Defendants/Respondents/Petitioners on Review,

and

GENERAL ELECTRIC COMPANY,

Defendant/Respondent/Respondent on Review,

and

SABERHAGEN HOLDINGS, a Washington corporation; BARTELLS ASBESTOS SETTLEMENT TRUST, a Washington corporation; GEORGIA PACIFIC CORPORATION (sued individually and as successor-in-interest to BESTWALL GYPSUM COMPANY); GOULDS PUMPS, INCORPORATED; GUARD-LINE, INC.; INGERSOLL-RAND COMPANY; JOHN CRANE, INC.; KAISER GYPSUM COMPANY; SEPCO CORPORATION; TUTHILL CORPORATION (sued individually and as successor-in-interest to CORPUS ENGINEERING CORP.); and UNION CARBIDE CORPORATION,

Defendants.

SUPPLEMENTAL BRIEF OF RESPONDENT GENERAL ELECTRIC COMPANY

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I. INTRODUCTION

General Electric Company (GE), defendant/respondent at the Court of Appeals and respondent on review, submits this supplemental brief for the Court's consideration. The Court of Appeals affirmed the summary judgment dismissal of GE on the alternate ground of collateral estoppel, Braaten v. Saberhagen Holdings, 137 Wn. App. 32, 40, 151 P.3d 1010 (2007), and no party sought review of the Court of Appeals' decision affirming GE's dismissal on that ground.

Nevertheless, the Court of Appeals' decision on the duty to warn has a far-reaching impact on GE, and indeed on all who make and sell products that may be used "in conjunction" with other manufacturers' products. The merits decision should be reversed as an unwise extension of the common law without precedent in Washington.

II. STATEMENT OF ISSUE PRESENTED FOR REVIEW

Should an equipment manufacturer be held to have a duty to warn, under negligence and strict liability principles, of dangers solely inherent in the thermal asbestos insulation that causes a plaintiff's injuries, when the equipment manufacturer sold and delivered its equipment to the Navy without thermal insulation, and did not make, sell or supply the injury-causing thermal asbestos insulation that the Navy bought from others and applied to the equipment after sale and delivery?

III. STATEMENT OF THE CASE

A. Factual Background.

Plaintiff Vernon Braaten, a marine pipe fitter, worked at Puget Sound Naval Shipyard (PSNS) from 1967 to 2002. CP 292. He was diagnosed with mesothelioma, a cancer associated with asbestos exposure, in 2003. CP 8. Plaintiff sued the manufacturers of various asbestos-containing products, and also sued manufacturers who supplied equipment to the Navy. CP 7-10. As to the equipment manufacturers, he alleged that he was exposed to asbestos when he worked around their equipment because the equipment was "used in conjunction" with asbestos-containing products. CP 8; CP 293-94 (pp. 39-41). As to GE turbines, he testified that he was so exposed when he removed exterior insulation (used to keep the engine rooms quiet and keep the heat in the turbine rather than on personnel) from the turbines so that machinists could do inside maintenance.[1] Id.

GE manufactured marine turbines to precise Navy specifications for U.S. Navy ships, and performed all aspects of its turbine work related

[1] For normal maintenance, the GE marine turbines had an access type panel. CP 2146 (pp. 119-20). The Navy required GE to manufacture the turbines with hangers so that a cloth-covered insulating "pillow" or "pad" could later be wired on and easily lifted on or off of the panel. CP 2145-46 (pp. 114-15, 119-20). Plaintiff saw three different kinds of insulation on the outside of the turbines. CP 293(pp. 39, 41). Plaintiff does not contend that he was exposed to any asbestos-containing product inside GE turbines, App. Br. at 34-35, and never saw a GE turbine open at PSNS. See CP 5319.

to Navy vessels under the immediate supervision of the Navy through Navy Sea Systems Command ("NAVSEA") officers. CP 5302-03. GE manufactured and shipped the turbines to the Navy without any thermal insulation materials (asbestos-containing or otherwise) on them. CP 5302.

GE did not manufacture or supply any thermal insulation that the Navy may have later placed on the turbines. Id.; CP 2123. Rather, the thermal insulation applied after the turbines left GE's control would be whatever the Navy selected, specified and installed in accordance with the Navy's Manual of Thermal Insulation, and would have been supplied and installed by entities other than GE. Id. The Navy's use of asbestos aboard ships and on turbines was based upon the Navy's determination of military necessity. CP 5244-46. The Navy had extensive knowledge about asbestos and took a variety of precautions over the years with respect to it.[2] CP 5244-58; Resp. Brief of GE, pp. 5-8.

B. Procedural Background.

The Honorable Sharon Armstrong granted summary judgment to GE and other equipment manufacturer defendants on the ground that they did not have a duty to warn of dangers of someone else's product. See CP 5560 ("GE had no duty to warn of potential dangers associated with the

[2] Although Mr. Braaten denied being warned by the Navy, the Navy's Safety Handbook for Pipefitters, issued in 1958, provided in part: "Asbestos. Asbestos dust is injurious if inhaled. Wear an approved dust respirator for protection against this hazard." CP 5255.

use of asbestos-containing products manufactured, sold, or installed by third parties, unless contained in the turbine when delivered"). Judge Armstrong granted summary judgment in Simonetta v. Viad Corp., No. 80076-6, on the same basis. The Court of Appeals in both cases reversed on the duty to warn, holding that the equipment manufacturers had a duty to warn, under negligence and strict liability principles, of the dangers solely inherent in after-applied asbestos products that the equipment manufacturers did not make or sell. Braaten v. Saberhagen Holdings, 137 Wn. App. 32, 151 P.3d 1010 (2007); Simonetta v. Viad Corp., 137 Wn. App. 15, 151 P.3d 1019 (2007). This Court granted review in both cases.

IV. ARGUMENT

Until the Court of Appeals decisions in Braaten and Simonetta, the common law placed the responsibility for an injury-causing product upon the manufacturer of that product and others in its chain of distribution. No Washington appellate court had held that a manufacturer of a product that did not injure the plaintiff had a duty to warn, in negligence or strict liability, of dangers solely inherent in a different product, which it did not make or sell, that did injure the plaintiff. Yet the Court of Appeals, many decades after the fact, decided that the equipment manufacturers had duties that, at the time they were supposed to have complied with such duties, the manufacturers could not have imagined existed.

A. The Court of Appeals Departed From Settled Law to Impose on Equipment Manufacturers a Duty to Warn of Dangers Inherent Solely in Thermal Insulation That the Equipment Manufacturers Did Not Make or Sell, and Which the Navy Selected and Applied to the Exterior of the Equipment Post-delivery.

Questions of law presented on summary judgment are reviewed *de novo*. Coppernoll v. Reed, 155 Wn.2d 290, 296, 119 P.3d 318 (2005). In Washington, "whether a particular class of defendants owes a duty to a particular class of plaintiffs is a question of law and depends on mixed considerations of 'logic, common sense, justice, policy, and precedent.'" Stalter v. State, 151 Wn.2d 148, 155, 86 P.3d 1159 (2004) (citations omitted). Although acknowledging these general principles, the Court of Appeals did not follow them in deciding to impose an expansive duty to warn upon the equipment manufacturers.

The Court of Appeals implicitly accepted Plaintiff's argument, App. Br. at 21, citing Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928), that "the existence of a duty turns upon the foreseeability of the risk of harm." In Washington, however: "Foreseeability limits the scope of a duty, but it does not independently create a duty." Halleran v. Nu West, Inc., 123 Wn. App. 701, 717, 98 P.3d 52 (2004), rev. denied, 154 Wn.2d 1005 (2005).

Moreover, New York's highest court has rejected the interpretation of Palsgraf posited by plaintiff:

> Foreseeability should not be confused with duty. The principle expressed in Palsgraf v. Long Is. R.R. Co. [...] is applicable to determine the scope of duty – only after it has been determined that there is a duty.

Pulka v. Edelman, 40 N.Y.2d 781, 358 N.E.2d 1019, 1022 (1976). Where there is no duty, foreseeability principles are inapplicable. Id. New York courts also look to considerations similar those announced in Stalter, supra, to determine whether a duty exists:

> The threshold question in any negligence action is: does defendant owe a legally recognized duty of care to plaintiff? Courts traditionally "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability." Thus, in determining whether a duty exists, "courts must be mindful of the precedential, and consequential, future effects of their rulings, and 'limit the legal consequences of wrongs to a controllable degree.'"

Hamilton v. Beretta U.S.A. Corp., 96 N.Y.2d 222, 750 N.E.2d 1055, 1060 (2001) (citations omitted).

B. No Washington Statutory or Common Law Rule Supports the Court of Appeals' Imposition on an Equipment Manufacturer, in Negligence or Strict Liability, of a Duty to Warn of Dangers Inherent Solely in a Different Manufacturer's Product When the Equipment Manufacturer Did Not Make or Sell the Latter Product.

In a negligence action, the plaintiff must first establish "a statutory or common-law rule that imposes a duty upon defendant to refrain from the complained-of conduct and that is designed to protect the plaintiff

against harm of the general type." Bernethy v. Walt Failor's, Inc., 97 Wn.2d 929, 932, 653 P.2d 280 (1982).

Product makers have routinely been held liable in Washington for negligence in failing to warn of dangers inherent in their own products, but neither plaintiff nor the Court of Appeals cited any Washington statutory or common law rule that supported the Court of Appeals' imposition of a duty upon one product manufacturer to warn of dangers solely inherent in another manufacturer's product, which the first manufacturer did not make or sell, merely because its product might be used "in conjunction" with the other manufacturer's product.

Nor did plaintiff or the Court of Appeals cite any case where strict liability principles have been applied to impose a duty on product manufacturers to warn of dangers solely inherent in products they do not make or sell.[3] Under Restatement (Second) of Torts § 402A, to hold a defendant strictly liable for injuries caused by a product, a plaintiff must demonstrate that (1) the seller is engaged in the business of selling the product and (2) the product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

[3] Under strict liability principles, a manufacturer is held strictly liable only where it "failed sufficiently to warn of the dangers inherent in its product," thereby rendering the product unreasonably dangerous. E.g., Little v. PPG Industries, Inc., 92 Wn.2d 118, 124-25 & n. 4, 594 P.2d 911 (1979); May v. Dafoe, 25 Wn. App. 575, 577-78, 611 P.2d 1275, rev. denied, 93 Wn.2d 1030 (1980) (manufacturer may be held strictly liable for injuries resulting from a failure to warn of its own product's dangerous propensities).

Ulmer v. Ford Motor Co., 75 Wn.2d 522, 530, 452 P.2d 729 (1969) (citing § 402A). Strict liability is limited to entities in the "chain of distribution" for the injury-causing product. Seattle-First Nat'l Bank v. Tabert, 86 Wn.2d 145, 148, 542 P.2d 774 (1975).

In extending liability to all entities in the chain of distribution, the Tabert court reasoned that manufacturers and retailers in the chain of distribution are in a position to "argue out" any questions with respect to their respective liabilities.[4] 86 Wn.2d at 149. The policy behind chain of distribution liability reflects principles underlying strict liability, including the principle "that the burden of accidental injuries caused by products . . . be placed upon those who market them." Restatement (Second) of Torts, § 402A, comment c. Braaten and Simonetta represent a significant and unwarranted departure from these settled principles by imposing a strict liability duty to warn upon entities such as equipment manufacturers that are outside the chain of distribution of, and did not market or sell, the injury-causing product (thermal asbestos insulation).

[4] For example, in Zamora v. Mobil Oil Corp., 104 Wn.2d 199, 704 P.2d 584 (1985), a distributor who had never physically handled, modified, altered, transported, or refined the propane it sold to a retailer was strictly liable for injuries caused by a propane explosion that occurred because the gas had been inadequately odorized, because the distributor was in the chain of distribution of a defective product. Id. at 207-08. The distributor had also agreed to hold the retailer harmless in the event of liability resulting from improper odorization. Id. at 207.

The Court of Appeals cited Teagle v. Fischer & Porter Co., 89 Wn.2d 149, 570 P.2d 438 (1977), as aiding in its analysis. Braaten, 137 Wn. App. at 43. In Teagle, the defendant made a device called a flowrater, which measured liquid chemicals, including ammonia, and was designed to hold chemicals pressurized up to 440 pounds per square inch (p.s.i.). 89 Wn.2d at 150-52. The defendant manufacturer knew, but did not warn, that a material called Viton used in O-rings was not compatible with ammonia and might disintegrate, which could harm someone if the flowrater exploded while containing chemicals pressurized above 50 p.s.i. Plaintiff's employer used Viton O-rings and the flowrater exploded, injuring plaintiff. Id. at 151-52. The court held the defendant strictly liable for failing to warn.

The Court of Appeals correctly recognized the significant factual distinction between Teagle and the cases now before this Court: In Teagle, the liable manufacturer's product itself exploded causing the plaintiff's injuries, Braaten, 137 Wn. App. at 44, whereas here Mr. Braaten was injured solely by asbestos products that the equipment manufacturers did not make, sell, or supply.

Because of this significant distinction, the Court of Appeals was compelled to go farther afield to find some support for its radical expansion of tort duties. As in Simonetta, the Court of Appeals in Braaten

relied almost exclusively upon Stapleton v. Kawasaki Heavy Industries, Ltd., 608 F.2d 571 (5th Cir. 1979), modified, 612 F.2d 905 (5th Cir. 1980), a case that had not been cited by any party, to find some source for imposing a duty. Stapleton is both distinguishable and inapposite.

In Stapleton, the plaintiff's son accidentally tipped over a motorcycle while cleaning it. The fuel switch had been left in the "on" position, allowing gasoline to leak from the gas tank. The gas was ignited by the pilot of a nearby heating unit, injuring the plaintiff. Because the Kawasaki manual warned about the possibility that fuel could leak from the tank if the motorcycle was tilted when the fuel switch was in the "on" position, the question for the jury was whether Kawasaki's warning was an adequate effort to warn and whether the location of the warning was sufficient to warn of the danger. 608 F.2d at 572-73. Thus, the failure to warn arose with respect to the inherent design of the motorcycle, which permitted gasoline to leak from the motorcycle's gasoline tank (which was supposed to contain the gasoline) when the motorcycle was laid on its side. As characterized by the court, plaintiff's claim was that Kawasaki breached a duty to warn "about the dangerous nature of the fuel switch on

the motorcycle," 608 F.2d at 572, not the dangers inherent in gasoline itself.[5]

The Court of Appeals attempted to analogize the Kawasaki gasoline tank's release of gasoline (if tilted when the fuel switch was in the "on" position), to the equipment at issue here, incorrectly referring to asbestos as being "contained in" the equipment or as "being released" by the equipment. Braaten, 137 Wn. App. at 45-46. Neither characterization is correct as to exterior insulation applied by others to equipment after the equipment was sold and delivered to the Navy. The equipment was not designed to "contain" the exterior thermal insulation, and the equipment did not "release" asbestos.

Defendants cited Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488 (6th Cir. 2005), a case presenting identical facts, to the Court of Appeals. There, the plaintiff merchant seaman alleged that defendants were liable, under negligence and strict liability theories, for his asbestos exposure. 424 F.3d at 491-92, 495. Various defendants, including equipment manufacturers whose equipment was supplied without asbestos, moved for summary judgment. The court held that the

[5] In its opinion on modification, the Stapleton court noted that the defendants had not objected to the trial's court's description to the jury of the failure to warn claim as one "for failing to warn the purchaser and public generally of the motorcycle's unsafe design feature." 612 F.2d at 905.

defendants whose equipment was supplied without asbestos could not be liable to the plaintiff for injuries allegedly caused by asbestos products added later to the equipment by others. Id. at 496-97.

The Court of Appeals attempted to distinguish Lindstrom on the basis that the decision concerned causation, not duty, and suggested that the Lindstrom court presumed a duty to warn. 137 Wn. App. at 42. Had the Lindstrom court presumed a duty to warn of dangers inherent in other manufacturers' asbestos products, however, it could not have resolved causation as a matter of law for defendants based upon their showing that they did not sell or supply the injury-causing asbestos products.

C. The Court of Appeals Mischaracterized the Equipment as the Injury-Causing Products.

It has long been settled law that a plaintiff alleging an asbestos-caused injury must identify the manufacturer of the asbestos product that caused the injuries. Lockwood v. A C & S, Inc., 109 Wn.2d 235, 245, 744 P.2d 605 (1987) (to have a cause of action in a product liability case, a plaintiff "must identify the particular manufacturer of the product that caused the injury"). Lockwood is in accord with traditional products liability law. See Martin v. Abbott Laboratories, 102 Wn.2d 581, 590, 689 P.2d 368 (1984) ("Traditional products liability theory has always required a reasonable connection between the injured plaintiff, the injury-causing

product, and the manufacturer of the injury-causing product"); Nigro v. Coca-Cola Bottling, Inc., 49 Wn.2d 625, 626, 305 P.2d 426 (1957) (proof that defendant supplied the product causing the injury is an essential element of a breach of implied warranty claim). This is a threshold requirement. Identifying the manufacturer of the product that caused the harm is an essential element both in considering causation and in considering whether there is any case for a manufacturer to answer.

It is undisputed that plaintiff suffered an asbestos-caused injury. As the trial court recognized in granting summary judgment, the products that caused plaintiff's injury are asbestos products that the equipment manufacturers did not make, sell, or supply. While a manufacturer may be held strictly liable for injuries resulting from a failure to warn of its own product's dangerous propensities, the injury at issue "must be the result of a functioning of the product itself." May v. Dafoe, 25 Wn. App. 575, 577-78, 611 P.2d 1275, rev. denied, 93 Wn.2d 1030 (1980).[6]

To justify the contrary result it reached, and to avoid the dictates of Lockwood and the fact that the equipment manufacturers were not in the chain of distribution of the injury-causing asbestos products, the Court of

[6] In May, the plaintiff was injured because the Isolette incubator the defendant manufactured permitted him to be exposed to excessive oxygen, but that was not due to a dangerous propensity of the incubator itself, but was rather the result of a medical decision to administer oxygen. 25 Wn. App. at 578. Similarly, the Navy decided to use insulation, decided what insulation to use, and obtained it from others.

Appeals resorted to semantics to characterize the equipment as the injury-causing products, even though Mr. Braaten's mesothelioma was caused by asbestos, not by turbines, valves or pumps.[7] 137 Wn. App. at 47 n. 47, 49.

As a result of mischaracterizing the equipment as the injury-causing products, the Court of Appeals has announced an unfair and untenable rule of law -- that one manufacturer's product is unreasonably dangerous for failing to contain warnings that a different manufacturer's product (which the first manufacturer did not make or sell) is unreasonably dangerous.[8] This is not only a bad rule of law, but it is also inconsistent with the rationale behind "chain of distribution" liability, as discussed in Part D. below. Moreover, this mischaracterization may be cited to justify future contentions that such products are the "relevant products" in actions brought under the WPLA. See RCW 7.72.010(3).

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[7] In Garman v. Magic Chef, Inc., 117 Cal. App. 3d 634, 173 Cal. Rptr. 20 (Cal. App. 2d Dist. 1981), the plaintiffs sued the manufacturer of a cooking stove that operated on propane, after an explosion caused by leaks in the plaintiffs' propane system, for failing to warn consumers that the stove's flame could ignite gas leaking from another source. Id. at 636-37. The court determined that the stove manufacturer had no duty to warn of the possible defect in the product of another. Id. at 638-39. The court emphasized, id. at 638, that a manufacturer of a nondefective product is not liable for failing to warn of the dangers of another's product, and stated: "To say that the absence of a warning to check for gas leaks in other products makes the stove defective is semantic nonsense."

[8] The manufacturer that incorporates defective component parts into its own product and then sells the product as an assembled whole is subject to liability caused by its product's component parts. See Lenhardt v. Ford Motor Co., 102 Wn.2d 208, 683 P.2d 1097 (1984); see RCW 7.72.010. That is not the case here. GE did not integrate or incorporate the injury-causing thermal asbestos insulation into its product and then sell it. Rather, GE sold and delivered its turbines to the Navy without thermal insulation, and the Navy obtained from third parties the insulation it applied to the turbine's exterior.

D. The Court of Appeals Decision Is Not Supported by Public Policy.

The duty imposed by the Court of Appeals is not supported by considerations of "logic, common sense, justice, policy and precedent." Stalter, 151 Wn.2d at 155. The decision focuses only on the aspect of public policy that seeks to compensate the plaintiff and fails to give balanced consideration to the impact of its decision on civil defendants and the legal system. Plaintiff is not without remedy. He named several manufacturers of asbestos-containing products in his action. Some asbestos manufacturers are still solvent, and most in bankruptcy have trust claim procedures. Plaintiff also has the equivalent of workers' compensation protection from the Navy. A desire to expand the sources of possible recovery for asbestos plaintiffs may be understandable, but the courts "do not premise liability on manufacturers solely because of their ability to pay tort judgments." George v. Parke-Davis, 107 Wn.2d 584, 590, 733 P.2d 507 (1987).

The Court of Appeals decisions create great uncertainty and will have significant adverse economic impacts on the new class of "asbestos" defendants, who are now deemed subject to liability for injuries caused by asbestos insulation, because many decades ago they made a product that could or likely would be insulated, even though the injury-causing asbestos insulation was made, sold, and applied by others to the outside of

defendants' equipment after delivery. Such adverse economic impacts include a significant increase in already enormous costs of litigation and future costs to research other products that might be used "in conjunction" with one's own, even though the other product may be the sole cause of injury. Costs to purchasers of equipment must necessarily increase if a company is to stay in business. Efficacious new products may not be developed or marketed at all due to the risks inherent in someone else's products that might be used in conjunction with such new products.

The decision will also have an adverse impact on Washington courts. With only rare exceptions, courts across the country have held that one manufacturer does not have a duty to warn of risks of another manufacturer's product that the first manufacturer did not make or sell.[9]

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[9] E.g., Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289, 582 N.Y.S.2d 373, 377, 591 N.E.2d 222, 225-26 (1992) (declining "to hold that one manufacturer has a duty to warn about another manufacturer's product when the first manufacturer produces a sound product which is compatible for use with a defective product of the other manufacturer," noting that the tire manufacturer "had no control over the production of the subject multipiece rim, had no role in placing that rim in the stream of commerce, and derived no benefit from its sale"); Baughman v. General Motors Corp., 780 F.2d 1131, 1132-33 (4th Cir. 1986) (truck manufacturer had no duty to warn against replacement multi-piece wheel rim assembly supplied by another manufacturer because such a rule would impose an excessive burden on a manufacturer to test and warn against a myriad of products made by any number of manufacturers, and because the rationale for imposing liability did not exist where the defendant had not incorporated defective product into its product and had not placed the defective product into the stream of commerce); Reynolds v. Bridgestone/Firestone, Inc., 989 F.2d 465, 472 (11th Cir. 1993) (applying Alabama law and holding that a tire manufacturer had no duty to warn of dangers in exploding rim assembly manufactured by another because "[t]he manufacturer of a non-defective component tire, cannot be held liable for injuries caused by a product it did not manufacture, sell, or otherwise place in the stream of commerce"); Acoba v. General Tire, Inc., 986 P.2d 288, 305 (Haw. 1999) (same); Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488, 496-97 (6th Cir. 2005) (manufacturers who supplied products without the

As the court explained in Garman v. Magic Chef, Inc., 117 Cal. App. 3d 634, 638, 173 Cal. Rptr. 20 (Cal. App. 2d Dist. 1981):

> . . . The use of any product can be said to involve some risk because of the circumstances surrounding even its normal use. Nonetheless, the makers of such products are not liable under any theory, for merely failing to warn of injury which may befall a person who uses that product in an unsafe place or in conjunction with another product

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asbestos to which plaintiff was exposed could not be held liable); Walton v. Harnischfeger, 796 S.W.2d 225, 226 (Tex. App. 1990), writ denied (1991) (crane manufacturer had no duty to warn or instruct users of its crane about nylon rigging it did not manufacture, incorporate into its crane, or place into stream of commerce); Brown v. Drake-Willock Int'l, 209 Mich. App. 136, 530 N.W.2d 510, 514-15 (1995), appeal denied, 562 N.W.2d 198 (1997) (makers of dialysis machine did not have duty to warn hospital employee of dangers of formaldehyde she used to clean machine even though its use was recommended by some defendants and anticipated by another); Spencer v. Ford Motor Co., 141 Mich. App. 356, 367 N.W.2d 393, 396 (1985) (undesirable results would flow from finding a car manufacturer liable just because car could accommodate dangerous or defective replacement parts); Mitchell v. Sky Climber, Inc., 396 Mass. 629, 631, 487 N.E.2d 1374, 1376 (1986) ("We have never held a manufacturer liable, however, for failure to warn of risks created solely in the use or misuse of the product of another manufacturer"); Garman v. Magic Chef, Inc., 117 Cal. App. 3d 634, 638, 173 Cal. Rptr. 20 (Cal. App. 2d Dist. 1981) (propane stove manufacturer had no duty to warn that stove's flame could ignite gas leaking from propane system, explaining that the stove was not unreasonably dangerous or unsafe "simply because it is used with natural gas"); Blackwell v. Phelps Dodge Corp., 157 Cal. App. 3d 372, 377-78, 203 Cal. Rptr. 706 (Cal. App. 2d Dist. 1984) (failure to warn rule "does not apply where it was not any unreasonably dangerous condition or feature of *defendant's* product which caused the injury") (emphasis in original; citations omitted); Powell v. Standard Brands Paint Co., 166 Cal. App. 3d 357, 364, 212 Cal. Rptr. 395, 398 (Cal. App. 3d Dist. 1985) (emphasis in original) ("the manufacturer's duty is restricted to warnings based on the characteristics of *manufacturer's own product* . . . the law does not require a manufacturer to study and analyze the products of others and to warn users of risks of those products"); Firestone Steel Prods. Co. v. Barajas, 927 S.W.2d 608, 615-16 (Tex. 1996) (no duty to warn in negligence or strict liability of another manufacturer's products even if they may be used with manufacturer's own products); Ford Motor Co. v. Wood, 119 Md. App. 1, 703 A.2d 1315, 1332, writ denied, 709 A.2d 139 (1998) (court was "unwilling to hold that a vehicle manufacturer has a duty to warn of the dangers of a product that it did not manufacture, market, sell, or otherwise place into the stream of commerce"); In Re Deep Vein Thrombosis, 356 F. Supp. 2d 1055, 1068-69 (N.D. Cal.) (rejecting contention that Boeing, as manufacturer of airplane, had duty to warn passengers of risks of deep vein thrombosis as a result of cramped seating manufactured and installed by others at the direction of airlines).

which because of a defect or improper use is itself unsafe.

. . .

As a result of the Braaten and Simonetta opinions, Washington will become a destination forum for numerous non-resident asbestos and other plaintiffs whose own states have rejected the imposition of liability on one defendant for someone else's product.

Moreover, the Washington Court of Appeals' decisions are in conflict with the "chain of distribution" or "stream of commerce" justifications for imposing strict liability. The rationale behind "chain of distribution" liability is that relationships exist as among manufacturers, distributors and retailers that put them in a position to "argue out" any questions as to their respective liabilities. Tabert, 86 Wn.2d at 149. No such relationships exist here.

The decisions are also inconsistent with the rationale for strict liability that "the burden of accidental injuries caused by products intended for consumption [should] be placed upon those who market them," and "be treated as a cost of production against which liability insurance can be obtained . . . ." See Restatement (Second of Torts) § 402A, comment c.

The equipment manufacturers here did not make, and had no control over the production of, the injury-causing asbestos applied to their products after they delivered their products to the Navy. They were not in

the chain of distribution of the injury-causing asbestos insulation and did not place it in the stream of commerce. They made no profit from the injury-causing asbestos. They could not have anticipated that, in their costs of production, they would need to provide for the prospect of injuries caused by asbestos products they did not make or sell, nor could they or their insurers have anticipated that liability insurance would be necessary to protect against injuries caused not by their own products, but by products made and sold by others.

Finally, the decisions ignore both reality and practicality. A steam turbine, for example, has a potential useful life of 50-plus years. External insulation, not sold or installed by the turbine manufacturer, may be replaced many times over the life of the product, changing as insulation technology changes over time. Warnings that may be appropriate for one type of insulation at one time (plaintiff here testified that three different kinds of insulation were on the outside of the turbines, CP 293 (pp. 39, 41)) may be or may become improper or ineffective for a different kind of insulation at a different time. A risk of confusion necessarily exists as warnings of the equipment manufacturer who does not make or sell the asbestos product may be inconsistent with warnings or recommendations given by the asbestos product manufacturer or by the Navy or other

employer (i.e., those in the best position to investigate the dangers of the product or the worksite).

The duty to warn is and should be the responsibility of the makers of the products that actually cause the harm, because they are in the best position to discover and warn of any dangers inherent in their products, and they are the ones placing such products into the stream of commerce and reaping the economic benefits thereof. To impose instead a duty to warn on the makers of whatever surfaces asbestos insulation was ultimately placed by others does violence to concepts of "'logic, common sense, justice, policy, and precedent.'" Stalter, 151 Wn.2d at 155.

V. CONCLUSION

For the foregoing reasons, and those stated in GE's Brief of Respondent, its Answer to Petitions for Review, and in the briefing of petitioners, the Court of Appeals' decisions imposing a duty to warn should be reversed.

RESPECTFULLY SUBMITTED this 8th day of February, 2008.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 8th day of February, 2008, I caused a true and correct copy of the foregoing document, "Supplemental Brief of Respondent General Electric Company," to be delivered in the manner indicated below to the following counsel of record:

VIA LEGAL MESSENGER

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DATED this 8th day of February, 2008, at Seattle, Washington.

Carrie A. Custer
Carrie A. Custer

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BRAATEN

Plaintiff/Petitioner

vs

No. 80251-3
DECLARATION OF
EMAILED DOCUMENT
(DCLR)

BUFFALO PUMPS; ET AL.

Defendant/Respondent

Pursuant to the provisions of GR 17, I declare as follows:

1. I am the party who received the foregoing facsimile transmission for filing.
2. My address is: 119 W. Legion Way, Olympia, WA 98501
3. My phone number is (360) 754-6595
4. The e-mail address where I received the document is: oly@abclegal.com.
5. I have examined the foregoing document, determined that it consists of 33 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: February 8, 2008, at Olympia, Washington.

Signature: Becky Gogan

Print Name: BECKY GOGAN